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No. 82-858

IN THE

Supreme Court of the United States

October Term, 1982

WAYNE N. HOWARD and MICHAEL E. TRAUSCHT,
Petitioners and Cross-Respondents,

v.

WALTER ROBERT TAYLOR,
Respondent and Cross-Petitioner.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit referred to by both the Petition and Cross-Petition for Writ of Certiorari may now be found in the official reporter as *Taylor v. Gilmartin*, 686 F.2d 1346 (10th Cir. 1982).

STATEMENT OF THE CASE

Cross-Respondents rely upon the statement of the case contained in its Petition for Writ of Certiorari, No. 82-698.

Cross-Petitioner's statement of the case misstates the facts of the case insofar as it omits the fact that following the declaration that Judge Benson's order was void (page 6, Cross-Petition), that declaration was ruled to be of no effect by the presiding judge of the judicial circuit. (See pp. 902-03 of Trial Transcript, Appendix hereto). Jurisdiction over the subject matter was held to reside exclusively in Judge Benson under Okla. Stat. tit. 20 § 95.7. Judge Benson's initial order was in force and effect until he vacated it on August 13, 1976.

The Cross-Petition also contains a misstatement of the facts at page 17, where certain statements are attributed to the trial court without benefit of citation to the record.

Judge Daugherty's remarks, cited out of context, in no way addressed any animus or "state involvement" on Judge Benson's part. Instead, as can be seen from the proper context reproduced in the Appendix hereto, Judge Daugherty was in the first instance relying upon Judge Benson's knowledge of what was to happen in support of his directed verdict on the issue of false imprisonment and in the latter instance was quoting a witness (Scharff), not rendering his own opinion or observation as Cross-Petitioner suggests.

REASONS FOR DENYING THE WRIT

1. THE COURT BELOW CORRECTLY DECIDED THE ISSUE.

The decision of the Tenth Circuit Court of Appeals on the § 1983 claim was correct.

The assertion of Cross-Petitioner notwithstanding, the Court of Appeals did *not* find that there was "state action," but no action taken "under the color of state law."

While the extent to which the Court of Appeals considered these concepts to be distinct is not set forth with the degree of clarity which might be wished, the opinion of that court plainly states:

> *The color of law requirement which is part and parcel of § 1983, Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, 90 S. Ct. 1598, 1604, 26 L. Ed. 2d 142 (1970), *is not satisfied under the facts of the case.* It is impossible to say that the use of the court as part of the scheme, as occurred here in this case, is enough to constitute *state action.*

Taylor v. Gilmartin, 686 F.2d 1346, 1355 (10th Cir. 1982) (emphasis added).

In a later portion of the opinion, dealing with the § 1985 claim, the Court stated in a footnote:

> It should be clear from our holding on § 1983 in this decision that the defendants' use of the state court to attain what may prove to be unconstitutional goals is not tantamount to action under "color of law" as defined by § 1983. *Id.* at pp. 1360-61, n.9.

Furthermore, the Court of Appeals' opinion on § 1985 did not rest upon a finding of "state action" as that term has come to be used as a term of art in connection with Equal Protection and Civil Rights litigation. Instead, that opinion was based upon the theories that (1) purely private conspiracies to deprive a person of Constitutional rights applicable through the Fourteenth Amendment could be reached by 42 U.S.C. § 1985 without "state action" and (2) that the causal nexus to the state necessary to support a claim for violation of rights guaranteed by the Fourteenth

Amendment was supplied by the unwitting entry of the state into the factual situation as a result of a private conspiracy to induce the state to participate and deprive the plaintiff of his liberty. *Id.* at p. 1358.

A recent decision of this Court has held that conduct which constitutes "state action" is synonymous with action "under the color of state law" in the context of a § 1983 action, *Lugar v. Edmondson Oil Company*, ___ U.S. ___, 102 S. Ct. 2744 (1982).

Two earlier cases from this Court, *Adickes v. S.H. Kress and Company*, 398 U.S. 144 (1970) and *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978) appeared to require a two-pronged analysis in § 1983 cases involving Fourteenth Amendment rights. The first inquiry was whether or not there was "state action"; then a determination was to be made whether the action taken was "under color of state law."

The majority opinion in *Lugar, supra*, explained *Adickes* and *Flagg Bros.* as not in fact requiring the two-pronged analysis, but given the majority's statement that *Lugar* (1) presented a valid § 1983 cause of action insofar as it challenged the constitutionality of a Virginia statute, (2) that it was limited to the context of creditor's rights, and (3) that private misuse of a state statute does not describe conduct attributable to the state, the holding is consistent with that of the Tenth Circuit on the § 1983 question.

Under either analysis, however, the decision of the Court of Appeals was correct, and therefore, needs no review. Whichever analysis is appropriate, some conduct constituting either "state action" or action "under color of state law" must be demonstrated in order to state a claim under s 1983.

As noted by the Court of Appeals, the state's presence in

the factual setting of this matter was insufficient to constitute either "state action" or action taken "under color of state law," and therefore the acts of Judge Benson and the Oklahoma County sheriff's department are not fairly attributable to the State, *Rendell-Baker v. Kohn*, ___ U.S. ___, 102 S. Ct. 2764 (1982); *Lugar v. Edmondson Oil Co., Inc., supra.*

The bare fact that members of the state judicial system are found in the factual setting of a case has never been held to constitute state action. *Evans v. Abney*, 396 U.S. 435 (1970).

Invocation of the state legal process is traditionally a private function for which state office and authority are not needed, *Polk County v. Dodson*, ___ U.S. ___, 102 S. Ct. 445 at 450 (1981).

It has long been held in various circuits, including the 10th, that mere utilization of the state judicial process is insufficient to make the alleged deprivation of fundamental rights attributable to the state, *see e.g., Taylor v. Nichols*, 558 F.2d 561 (10th Cir. 1977); *Torres v. First State Bank of Sierra County*, 588 F.2d 1322 (10th Cir. 1978); *Brown v. Dunne*, 409 F.2d 341 (7th Cir. 1969); *Hall v. McClellan*, 490 F.2d 859 (5th Cir. 1974); *Sykes v. State of California (Department of Motor Vehicles)*, 497 F.2d 197 (9th Cir. 1974).

Furthermore, the plain holding of *Lugar, supra*, is that no § 1983 is made out where only abuse or misuse of a state law is alleged, rather than some Constitutional defect in the law itself. *Lugar v. Edmondson Oil Company, supra*, 102 S. Ct. at 2756.

As the Court of Appeals' opinion notes (and the Cross-Petition admits) neither Judge Benson nor the sheriff's

department were made Defendants or alleged to be unnamed, co-conspirators in this action. The constitutionality of the Oklahoma Statute used (as opposed to its misuse), was *never* an issue. In view of these facts, *Lugar* plainly controls this matter, and there was no § 1983 cause of action.

2. THE CASES RELIED UPON BY THE CROSS-PETITIONER ARE DISTINGUISHABLE ON THEIR FACTS OR ON THE LAW.

Cross-Petitioner relies on a number of cases previously decided by this Court in an effort to demonstrate that the actions of Cross-Respondents constituted "state action" or action "under color of state law." Each of these cases is distinguishable on its facts, and offers no support for Cross-Petitioner's theory.

The case of *Shelley v. Kraemer*, 334 U.S. 1 (1948) is offered for the proposition that judicial enforcement of racially restrictive covenants constitutes "state action." While judicial enforcement of the covenants was a part of the basis for the decision in *Shelley v. Kraemer, supra*, as the opinion in that case plainly shows, the Court's decision was also dictated by the fact that the enforcement of the restrictive covenants was part of and mandated by a pervasive, systematic scheme of unconstitutional racial discrimination which had been imposed by the state by virtue of previous state judicial decision or judicial review. *Shelley v. Kraemer, supra*, 334 U.S. at 21-22.

No comparable systematic state-imposed scheme to deprive persons of their Fourteenth Amendment Rights has been alleged or shown in this case. Even if it were true, as Cross-Petitioner suggests, that Judge Benson's order was completely contrary to statute, this would make his actions *contrary* to the mandate of the state. Under those circumstances,

Judge Benson's conduct could not conceivably be "fairly attributable to the state." Even more critical, *Shelley* dealt with *racial* discrimination, which is not a factor in the instant case.

Racial discrimination, in any form, is not only a violation of Equal Protection under the Fourteenth Amendment, but is unconstitutional independently of the Fourteenth Amendment by virtue of the Thirteenth Amendment's prohibition against involuntary servitude and its badges and incidents. The *Shelley* court could have reached the identical result on the basis of the Thirteenth Amendment alone, without consideration of the Equal Protection claim.

Cross-Petitioner also claims that the actions of Cross-Respondents were "state action" because they were a "misuse of state power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of the state. . ." citing *Monroe v. Pape*, 365 U.S. 167, 184 (1961), and *United States v. Classic*, 313 U.S. 299, 326 (1941).

Both these cases involved instances where officers of the state were defendants and allegedly abused the power of their offices in an unconstitutional manner. Neither of these cases hold that the mere resort to the state judicial process by private parties clothes those parties with the authority of the state, which is the conclusion implicit in Cross-Petitioner's argument.

In both cases, the acts complained of were performed *by the state officers*, not by private parties as is the case herein. The defendants in those cases were "clothed with the authority of the state" by virtue of their positions as state officers, not by reason of any resort to the judicial system. Those opinions furnish no guidance in this matter.

3. CROSS-PETITIONER'S ARGUMENT THAT THE DECISION BELOW WAS CORRECT IS WITHOUT MERIT.

It is asserted in Sections II and III of the Cross-Petition that Cross-Respondents' actions constituted state action because they were possible only because Cross-Respondents were "clothed with the authority of the state" and their acts were "so impregnated with governmental character as to be subject to Constitutional limitations." Cases are cited for the propositions that guardianship is an incident of sovereignty and that only the state can involuntarily confine and treat an adult.

Even assuming, *arguendo*, that these propositions are correct, and further assuming the truth of the material allegations of the complaint, this argument has no merit because it fails to establish any causal nexus between Judge Benson's order and the actions taken by Cross-Respondents subsequent to that order.

Even assuming that there was no jurisdiction for Judge Benson to enter the guardianship order, that order nevertheless only placed Cross-Petitioner in the custody of his father for a limited time and for the purposes of counseling. The order gave no commands as to the nature of the counseling to be given. It contained no orders as to the time, place and circumstances under which counseling could occur. These matters were left to Dr. Taylor and Cross-Respondents, and *decisions concerning actions subsequent to Judge Benson's order were made by them,* without further reference to or involvement with any state officials. The state was no more responsible for the actions of Cross-Respondents in this case than it was answerable for the actions of the private defendants in *Evans v. Abney, supra,* in *Flagg Brothers, Inc. v.*

Brooks, supra, in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) or in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

Cross-Petitioner does not complain of the fact that Judge Benson issued the order; indeed, he was never a defendant. Rather, this dispute concerns the character of the actions taken by Cross-Respondents in connection with the order. It is not asserted, nor could it be, that the courts of Oklahoma lacked the power under any circumstances to make Dr. Taylor his son's guardian or to involuntarily commit Cross-Petitioner for appropriate treatment, if necessary. It is the alleged abuse of that power *by Cross-Respondents, not* an abuse by the state which was the subject of the complaint.

In light of these facts, it cannot be said that the actions complained of by Cross-Petitioner are in any way fairly attributable to the state, *Rendell-Baker v. Kohn, supra.*

CONCLUSION

For these reasons, WAYNE N. HOWARD and MICHAEL E. TRAUSCHT, Cross-Respondents, pray that Cross-Petitioner's Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,
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December, 1982.

CERTIFICATE OF SERVICE

The undersigned Albert R. Vermeire, a member of the Bar of this Court and counsel of record for Wayne N. Howard, Petitioner and Cross-Respondent herein, hereby certifies that on the 16th day of December, 1982, he caused to be served the foregoing Cross-Respondents' Brief in Opposition on all parties to this appeal by mailing three copies thereof by First Class mail, postage prepaid, addressed to their attorneys, as follows:

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WALTER ROBERT TAYLOR, Plaintiff, -vs- KEVIN M. GILMARTIN, MICHAEL E. TRAUSCHT, WAYNE N. HOWARD, FREEDOM OF THOUGHT FOUNDATION, INC., JOSEPH ALEXANDER, ESTHER ALEXANDER, GARY SCHARFF, WALTER WINSTON TAYLOR, SYLVIA TAYLOR, DAVID TAYLOR, and DOES I THROUGH X, Defendants.	)	No. CIV-77-0351-D

TRANSCRIPT OF TRIAL PROCEEDINGS

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I've very carefully examined the record and I think Judge Benson's Court Order was valid, though I don't think that's necessarily essential to my ruling. He was a State Judge, the record indicates he was regularly assigned here; the record further indicates that the Chief of the Probation Court assigned this case to him and that he heard it and he entered an order of guardianship. This order clearly contemplated a deprogramming type situation with reference to a reluctant, uncooperative ward. I think once Judge Benson had jurisdiction of the Plaintiff in the subject matter of the case, which I believe he did, and entered his order, under Oklahoma law the jurisdiction to handle that case resides in him. The attempt of Judge Halley, by entering an order vacating Judge Benson's order, must be considered without legal force and effect because it violates the Statute of Oklahoma which provides that a Judge to whom a case has been assigned has continuing authority over it, including the determination of post-trial motions, until it's final disposition or until such case is removed from his jurisdiction by the appointing authority. This is 20 Oklahoma Statutes 95.7. There did not appear to have been a transfer order. There does not appear

to have been a removal of Judge Benson's jurisdiction by the appointing authority.

To the contrary, it seems to me that this matter was

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reviewed by the Chief Judge, or the presiding judge, and, in view of the circumstances, he determined that Judge Benson had continuing authority. Therefore, he had authority from July 15, 1976, when he entered the order, until August 13, 1976, when he vacated the order on the Motion of the Petitioner.

It seems to me that by the very term of false imprisonment, that it can't be sustained when the complained imprisonment of custody is done pursuant to a court order. One of the essential elements of actionable false imprisonment, of course, is in the title itself the word "false," which means it's unlawful. What one does under Court Order, in the way of restraining somebody who is authorized by the court order to do that, can hardly be called unlawful or false. Moreover, I think the evidence in this case indicates that the actual custody of the Defendant by the guardian was not in anyway improper, would not in any way change my decision that reasonable people could not differ with this. *In this connection, it is proper to consider that the Judge knew what this was about, knew what was going to happen, had this presented to him, and it's in the record and his order says as much.* In my view, under the evidence, there's no way to say that the actions of the guardian, and those acting for and under him, transcends or leaves the ambit of the Court's order.

[Emphasis indicates quotation cited out of context at p. 17 in Cross-Petition.]

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THE COURT: Did they grab him or just move over and he stopped? It seems to me that's what Mr. Scharff testified to. I didn't know that you even claimed that to be a battery.

MR. McMURRY: We are not.

THE COURT: Because you specifically asked your client what the batteries were, he listed three, cold water, hair and the torn pocket. Those are the only three batteries he said he complained of. If you give him the benefit of doubt and throw in the cake, if there was a battery connected with it; I don't think he claimed the telephone incident as a battery.

MR. McMURRY: I'm not claiming it is a battery, Your Honor, I'm claiming it as outrageous conduct.

THE COURT: *Well, Scharff explained why. The Court's order was to separate him from the sect, not let him communicate with the sect. That's what the Judge intended and that's what the order says. Is this outrageous conduct, to follow a Court Order?*

MR. McMURRY: I beg your pardon?

THE COURT: Would it be outrageous for a man to attempt to carry out a court order?

MR. McMURRY: If it's void, Your Honor.

[Emphasis indicates quotation cited out of context, erroneously attributed to trial judge, at p. 17 in Cross-Petition.]